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No. 85-1117

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ASHWOOD MANOR CIVIC ASSOCIATION, THE NETHER PROVIDENCE--SWARTHMORE ALLIANCE OF CIVIC ASSOCIATIONS, INC. AND CITIZENS TO PRESERVE RADNOR,

Petitioners,

v.

ELIZABETH H. DOLE, SECRETARY OF TRANSPORTATION OF THE UNITED STATES; THOMAS D. LARSON, SECRETARY OF TRANSPORTATION OF THE COMMONWEALTH OF PENNSYLVANIA; MARPLE TOWNSHIP; RIDLEY TOWNSHIP; THE COUNTY OF DELAWARE; PENJERDEL COUNCIL; THE COMMITTEE FOR THE BLUE ROUTE; AND HERBERT J. LEIMBACH, INDIVIDUALLY AND ON BEHALF OF SWARTHMOREANS FOR THE BLUE ROUTE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THOMAS D. LARSON IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts, after exhaustively reviewing the full and complete federal administrative record and after hearing oral testimony, could have reasonably believed that there are no feasible and prudent alternatives to the use of small portions of parkland for a highway project.

TABLE OF CONTENTS

	Page
Opinions below.....	1
Jurisdiction.....	2
Counter-Statement of the Case.....	2
Counter-Statement of the Facts....	6
Reasons for Denying the Writ.....	21
I. The Lower Courts Reviewed the Alternatives Analyzed and Found that the Factual Record Clearly Supported the Administrative Finding that there Was no Feasible and Prudent Alternative to the Use of Parkland.....	21
II. There is no Direct Conflict Between the Third and Ninth Circuits on the Law.....	25
Conclusion.....	28

TABLE OF AUTHORITIES

CASES:

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).....	21
Stop H-3 Association v. Dole, 740 F.2d 1442 (9th Cir. 1984), cert. denied ____ U.S. ____, 105 S. Ct. 2344 (1985).....	25-26

STATUTES:

Page

Section 4(f), Department of Transportation Act, as amended, 49 U.S.C. §303..... passim

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 3a-6a) is not reported. The

Opinion and Order of the District Court (Pet. App. 10a-64a) is reported at 619 F. Supp. 52 (E.D. Pa. 1985).

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1985. The Petition for a Writ of Certiorari was filed on December 30, 1985 and was received by Thomas D. Larson on January 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

COUNTER-STATEMENT OF THE CASE

In 1974, litigation was filed to enjoin construction of a highway project called the "Blue Route" (Civil Action No. 74-925) by Citizens Council of Delaware County, et al. No motions were filed and no opinion was rendered. This case was

placed in the Civil Suspense File by the District Court on July 15, 1975. In 1981, after public hearings, preparation of Draft and Final Environmental Impact Statements (hereinafter "EIS"), and a section 4(f) approval (an approval to use land from a public park for the project under the Department of Transportation Act, 49 U.S.C. §303), litigation to enjoin the project was filed by Marple and Radnor Township, et al. (Marple Township, et al. v. Lewis, et al., C.A. 81-4627). On August 30, 1982, Judge VanArtsdalen issued an order and opinion upholding certain issues and remanding other issues. No appeal was taken. Following the opinion, a Supplemental Draft Environmental Impact Statement/Section 4(f) Evaluation ("DSEIS") was prepared and circulated, a public hearing was held, a Supplemental Final Environmental Impact Statement/-Section 4(f) Evaluation ("FSEIS") was

prepared and a section 4(f) approval was made (Pet. App. 12a, 15a-16a).

In 1984, Ashwood Manor Civic Association, et al. filed suit to enjoin construction of the project (Ashwood Manor Civic Association, et al. v. Dole, et al., C.A. 84-3951). On September 10, 1984, Actions 74-925, 81-4627, and 84-3951 were consolidated. Radnor Township, a plaintiff in C.A. 81-4627, was no longer a party to this case and Marple Township intervened as a defendant (Pet. App. 12a, n.3). On September 26, 1984, following testimony by the federal decisionmaker, Vincent Ciletti, and briefs, the District Court issued an order denying plaintiffs' Motion for Preliminary Injunction. On October 30, 1984, Marple Township, Ridley Township, Delaware County, Penjerdel Council, Committee for the Blue Route, and

Herbert Leimbach were permitted to intervene as party defendants.

Motions for summary judgment were filed by all parties. A hearing was held on January 28, 1985. On March 15, 1985, the District Court issued an opinion and order granting summary judgment in favor of the state and federal officials (Pet. App. 9a-66a).

On March 29, 1985, Ashwood Manor Civic Association and several plaintiffs filed a notice of appeal. On May 13, 1985, Swarthmore Borough filed a notice of appeal. Swarthmore College, a plaintiff in the District Court, did not appeal. The Court of Appeals for the Third Circuit affirmed the District Court (Pet. App. 5a-6a) and Ashwood Manor filed a Petition for a Writ of Certiorari with the Supreme Court.

COUNTER-STATEMENT OF THE FACTS

The Mid County Expressway, commonly known as the Blue Route, is a proposed four-and six-lane divided, federal-aid limited-access highway facility. It is planned as part of the Interstate Highway System and designated as I-476 (Pet App. 11a). The purposes of the project are to relieve traffic congestion within the region; to provide a more efficient connecting link between the Pennsylvania Turnpike to the north and I-95 to the south; to connect several radial highways; to divert traffic from heavily traveled north-south roads; and to complete the local Interstate Highway System. The project will connect several radial highways and divert traffic from heavily traveled north-south roads such as PA-320, PA-420 and PA-252.

Approximately 62% of the right-of-way between I-95 and the Pennsylvania Turnpike has been acquired, and approximately 8.8 miles of roadway (about 41% of the total length) have been constructed. Within the limits of the Final Supplemental Environmental Impact Statement ("FSEIS") (between I-76, the Schuylkill Expressway, and I-95), approximately 5.1 miles (30% of the 16.9 mile length) have been constructed and approximately 60% of the required right-of-way has been acquired.

1. Environmental Impact Study

Following the remand of the District Court in 1982, a Draft Supplemental Environmental Impact Statement/Section 4(f) Evaluation ("DSEIS") was prepared, circulated for review and comment, and public hearings were held. A Final Supplemental Environmental Impact Statement/-

Section 4(f) Evaluation ("FSEIS") was then prepared. On April 9, 1984, the FSEIS was approved and on July 25, 1984, the Record of Decision and Section 4(f) approval was signed (Pet. App. 15a-16a).

2. Section 4(f) Study

The FSEIS contained a detailed study of alternatives to avoid the taking of any Section 4(f) land. A major study was initiated in order to assure that a full range of alternatives was evaluated. Forty-six corridors for the Mid County Expressway were developed and analyzed (Pet. App. 17a-19a). These alternatives were found not to be prudent because of significant adverse effects. Four localized shifts were analyzed to avoid section 4(f) lands. Shift 2 was adopted and shifts 1, 3 and 4 were found not to be prudent because of significant adverse

effects (Pet. App. 50a-51a). The alternatives of not building any project (Do-Nothing), improving local roads, and improving local intersections were studied and found not to be prudent because of significant adverse effects (Pet. App. 16a).

a. Analysis of 46 Corridors

The FSEIS studied a 225 square mile area for alternatives to avoid the use of any parkland. Three bands of approximately 75 square miles, each band being about 15 miles long by 5 miles wide, were delineated. These three parallel bands (A, B, and C) divided Delaware County into three north-south segments representing travel patterns ("Travel Bands") (Pet. App. 17a). The approved project is located in Travel Band C, the easternmost Travel Band. Travel and socioeconomic

characteristics associated with trip-making for each of these bands were compiled and evaluated, and Travel Band C was determined to be the ideal location for the project. It was determined that an alignment located in Travel Band B would serve only 20% less traffic than one located in Travel Band C. Travel Bands C and B were included for further study. Based on a study prepared by the Delaware Valley Regional Planning Commission ("DVRPC"), the federal officials found that an alignment located in Travel Band A, with a smaller population and a lower travel demand, would serve 60% less traffic than one located in Travel Band C and 40% less than one in Travel Band B. The federal officials determined that, because of this low level of travel service, the westernmost area in Delaware County would not warrant a project and would not serve the needs of this project.

Therefore, Travel Band A was found not to be a prudent alternative (Pet App. 17a, 43a-45a). Ashwood Manor did not offer any evidence impeaching the accuracy or validity of the DVRPC report (Pet. App. 56a).

Travel Bands B and C (a 150 square mile area) were determined to be an area where possible alternative highway corridors could be developed. In Travel Bands B and C, 46 corridors were developed to avoid all Section 4(f) sites and were then analyzed (Pet. App. 17a-18a). The study required the locating, in a 150 square mile area, of data such as the municipalities, the parks, the historic sites, the neighborhood tracts, the prime farmland, the rivers and streams (Pet. App. 18a, 45a-47a). These areas were placed on maps and were input to a specially written computer program. The

study required the review of planning documents from 33 municipalities in a three county area. From those documents and other research materials, 75 parks were identified and mapped. In addition, over 300 potential historic sites were identified and mapped. In order to assess impacts on local communities and businesses, 76 neighborhood tracts and 16 business nodes were also identified and mapped. Links (smaller sections which when joined together connected I-95 and the Schuylkill Expressway) were then developed to avoid section 4(f) parks and historic sites. Forty possible links were developed (Pet App. 49a).

Using these 40 links, a total of 46 corridors (road alignments which are comprised of several links and connect I-95 and the Schuylkill Expressway) which avoided section 4(f) land were assembled

and then analyzed. The adverse effects of these 46 corridors were severe, including residential displacements (ranging from 139 to 792 as opposed to 50 for the approved project); costs (ranging from $279.4 million to $433 million as opposed to $233.1 million for the approved project); effects on prime farmland (most of the corridors require from 50 to 222 acres); right of way acquisition (most of the corridors require from 300 to 600 acres); inconsistency with land use planning of the municipalities (most of the corridors are inconsistent with between 5 and 11 land use plans); community disruption (adverse effects on up to 17 neighborhood tracts). Each corridor demonstrated unique and unusual impacts of extraordinary impact.

Eleven of the 46 corridors were then subjected to further study and analysis,

and they were again found not to be prudent alternatives to the use of parkland (Pet. App. 46a-47a).

Then, one of the 46 corridors, the least disruptive alternative, Corridor C-1 (also termed the "Total Avoidance Alternative"), was subjected to further review. Its adverse impacts were found to be extraordinary. Even plaintiffs conceded in the District Court that this is not a feasible and prudent alternative (Pet. App. 47a).

These alternatives and the studies were reviewed in detail by the District Court and were found not to be prudent alternatives (Pet. App. 50a).

b. The Do-Nothing Alternative Study

The Do-Nothing Alternative consists of not doing any work and is, in essence,

maintenance of the status quo. The status quo is that at peak travel hours the local roads in Delaware County are literally overflowing with traffic. Demand exceeds capacity on main roads and traffic spills into residential streets (Pet App. 40a). The capacity deficiency is so acute that drivers often seek bypass routes on secondary roads and residential streets to avoid the main road congestion. Truck travel is particularly constrained for both local and regional needs (Pet. App. 40a).

North-south travel demand has grown and will continue to grow with the development of key activity centers in the western suburbs. Without the project, 91% of the highway capacity will be utilized on a daily basis, as opposed to 66% if the highway is built (Pet App. 40a).

The District Court found no reason to doubt the accuracy of the data (Pet. App. 40a).

The Do-Nothing Alternative (a) will not relieve the traffic congestion; (b) will not provide an adequate highway network in the county; (c) will not complete the interstate system with a connection from I-95 to I-76; and (d) will not complete the expressway network on the western side of Philadelphia and will not provide a limited access bypass around the congested areas of Philadelphia.

Based on the factual record, the Do-Nothing Alternative was found by the federal officials and by the District Court not to be a prudent alternative (Pet App. 40a, 42a).

c. The Improvement of Intersections and Widening of Local Streets

The improvement of intersections and the widening of local roads were analyzed (Pet App. 16a, 42a).

Improvements to intersections in the area pose unique problems. They involve acquisition from section 4(f) sites (such as Radnor-Friends Historic District), major impacts to commercial areas along PA-320 and PA-252, and significant impacts on residences. Section 4(f) historic sites would be involved with improvements to the intersections at PA-320 and Conestoga Road, at Conestoga Road and Radnor-Chester Road, at PA-320 and US-30, at PA-320 and Old Gulph Road, and at PA-252 and Rose Tree and Palmers Mill Roads. Thus, intersection improvement involves section 4(f) sites and significant community disruption. Furthermore, this

alternative cannot provide the level of service or congestion relief that will be provided by the project. This alternative will also not complete the regional highway network, will not provide the limited access connection to existing radial routes, and will not provide for completion of the interstate system on the western side of Philadelphia (Pet App. 42a).

The widening of local streets was analyzed (Pet. App. 16a, 42a). In 1951, Swarthmore Borough Council, Ridley Township, Springfield Township and Swarthmore College requested a study to relieve traffic congestion on PA-320. This study to relieve congestion on PA-320 was the origin of future alignment studies which eventually resulted in the approval of this project. The widening of PA-320 involves the acquisition of 28 houses, 2

businesses, portions of 330 properties, adversely affects 27 historic sites, requires acquisitions from three section 4(f) sites, would increase noise levels, and would severly disrupt numerous established neighborhoods and communities. Also, the widening would not provide for the transportation needs of the region.

The intersection improvements and the widening of local streets were found by the federal agency and the courts not to be prudent alternatives (Pet. App. 42a-43a).

3. Mitigation

The proposal for the highway includes all possible measures to minimize harm to section 4(f) lands. The adoption of Shift 2, a localized shift, avoided one park and reduced the land taken from Smedley Park

(Pet. App. 19a, 51a). Impacts on and use of section 4(f) land were reduced and mitigated by reducing the highway from six to four lanes in certain sections; by narrowing the median strip along certain sections; by downscaping intersections; by providing noise barriers, landscaping and full access to the section 4(f) sites; and by providing for replacement of the parkland (Pet. App. 51a-53a).

The District Court found that the administrative record demonstrated that all possible planning has been included to minimize harm to section 4(f) land (Pet. App. 53a).

REASONS FOR DENYING THE WRIT

I. THE LOWER COURTS REVIEWED THE ALTERNATIVES ANALYZED AND FOUND THAT THE FACTUAL RECORD CLEARLY SUPPORTED THE ADMINISTRATIVE FINDING THAT THERE WAS NO FEASIBLE AND PRUDENT ALTERNATIVE TO THE USE OF PARKLAND.

The District Court carefully stated and utilized the standards established by the Supreme Court in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) in reviewing the federal section 4(f) determination (Pet. App. 20a-21a). In reviewing the section 4(f) determination, the District Court considered the testimony of the decisionmaker and the massive administrative record which included a two volume FSEIS (Pet. App. 37a-38a, 15a). The District Court found that the federal decisionmaker correctly construed his authority under the applicable federal law (Pet. App. 38a).

The District Court also reviewed the factual record regarding the Do-Nothing (no build) alternative (Pet. App. 40a-42a), the improvement to local roads alternative (Pet. App. 42a-43a), the improvement to local intersections alternative (Pet. App. 42a-43a), Travel Band A (Pet. App. 16a-17a, 44a-45a), the 46 alternative corridors (Pet. App. 44a-49a), and four localized shifts (Pet. App. 50a-51a). The factual record included traffic studies, traffic forecasts and population projections which were prepared by the Delaware Valley Regional Planning Commission, the agency designated to perform traffic assignments and evaluations for federal-aid projects in the area (Pet. App. 17a, 40a-41a). Plaintiffs did not offer any evidence to impeach the traffic study (Pet. App. 56a).

The uncontradicted facts in the administrative record evaluated by the District Court are that the roads in the area are presently congested each day for 45% to 50% of their length, with an additional 20% reaching unstable traffic flows. Demand exceeds capacity on main roads and traffic spills into residential streets. By the year 2000, 91% of the highway capacity will be utilized if no highway is built (Pet. App. 41a). The District Court considered the factual record, analyzing the improvement to local streets and improvement to local intersections. These alternatives would not only not alleviate the traffic problems but would entail substantial community disruption and would have affected other section 4(f) sites (Pet. App. 42a). The uncontradicted traffic studies of Travel Band A showed that it was so far removed from the main

population area that it would serve so little traffic that no facility is warranted in that area (Pet. App. 17a, 44a). The District Court also reviewed the significant disruption which would be caused by 46 other alternatives that were studied and rejected as not being prudent (Pet. App. 44a-49a).

The District Court found that the plaintiffs did not propose any specific alternative that was not considered and merely mounted criticisms that constitute a blanket condemnation of the whole project (Pet. App. 49a). The Court also found (a) that the factual record details and specifies the reasons why there is no feasible and prudent alternative and (b) that there is no evidence that any of the data was inaccurate (Pet. App. 62a). The District Court, "[h]aving critically

reviewed the massive record in this case . . . reached the firm conclusion that the 'Secretary could have reasonably believed in this case that there are no feasible alternatives or that alternatives do involve unique problems'" (Pet. App. 63a-64a).

This is a case where the District Court made findings and conclusions based on documentary evidence contained in a massive record. Ashwood Manor's contention is that the District Court should have adopted its view of the evidence. This is not an appropriate case for review and certiorari should be denied.

II. THERE IS NO DIRECT CONFLIC ' BETWEEN THE THIRD AND THE NINTH CIRCUITS ON THE LAW.

Petitioners argue a conflict exists between this case and Stop H-3 Association

v. Dole, 740 F.2d 1442 (9th Cir. 1984), cert. denied, ____ U.S. ____, 105 S. Ct. 2344 (1985). The two cases differ on a factual basis and not on a legal basis. The District Court reviewed Stop H-3 and found that the basic transportation and traffic facts in Stop H-3 were different from those in the present case (Pet. App. 42a). In Stop H-3, traffic studies showed a substantial unused traffic capacity, whereby not building the project was a feasible and prudent alternative. The District Court found that the uncontroverted facts in the present case are that currently a substantial portion of the major roads are operating at capacity, the situation will worsen, and there is no cushion to absorb future demand (Pet. App. 42a). The facts as found by the District Court are clearly distinct from those in Stop H-3 and clearly support the finding that the no-build alternative is not prudent.

Certiorari is warranted for the truly unusual situation where there is a direct conflict in the law between the Circuits and not where the relevant factual situations to which the law is applied differ. Certiorari should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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